Qiristar Bricks Contractor Sdn Bhd & Anor v Loo Ngan Keong & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–859 OF 2008
HUE SIEW KHENG J
18 FEBRUARY 2013

Land Law — Easement — Equitable easement — Whether defendants impliedly acquiesced to plaintiffs' use of access road — Whether public usage of access road over defendants' land existed even before land was alienated

The first plaintiff ('P1') operated a brick factory and it obtained the permission of the second plaintiff, which owned a plot of land ('Lot 2074') that had clayey soil, to excavate and extract the soil from Lot 2074 for the production of bricks at the factory. Since 1960, access to Lot 2074 had been by way of a bicycle/motorcycle track ('the access road') which ran over, inter alia, barren state land part of which came to be owned by the defendants as PT 20213 in September 2006. P1 only started using the access road over PT 20213 after May 2003 after it engaged a contractor, DW3, to fell rubber trees and clear the land on Lot 2074 to facilitate the excavation and extraction of the clayey soil therefrom. To remove the trees from Lot 2074, DW3 widened the access road to enable it to be used by large vehicles and other machinery. In 2007, the defendants, who had not made any use of PT 20213, engaged DW3 and another person as their agent to take care of PT 20213. DW3 began demanding that P1 pay toll for the use of the access road over the defendants' land and when P1 refused to do so DW3 verbally demanded in July 2008 that P1 cease using the road over PT 20213 and dug deep trenches across the road to deny vehicular access. In their instant action, the plaintiffs claimed that the defendants, through DW3, were at all material times aware, and had acquiesced to, P1's use of the access road over their land and that P1 had accordingly acquired an equitable easement over the access road. The plaintiffs, inter alia, sought an injunction to restrain the defendants and their agents from interfering with their use of the access road as well as for damages for loss of access and business losses suffered by P1.

Held:

(1) As far back as 2003, DW3 was aware of P1's need for access and in fact, was expressly engaged for the task of, inter alia, obtaining consent for right of way on a long-term basis from the relevant lot owners. Therefore, when DW3 was engaged in 2007 by the defendants he was not only familiar with the layout of that area but was also aware P1 had been using

the access road since 2003. DW3 had himself widened the access road to make it accessible to lorries and other machinery so that excavation of clayey soil by P1 from Lot 2074 would be possible (see paras 34-35).

(2) Usage of the access road over PT 20213 by members of the public had been established since the 1960s, well before the land was alienated in 2006 (see para 47).

(3) As DW3 was the defendants' authorised agent in respect of PT 20213 and DW3 having full knowledge of all antecedent facts pertaining to the access road, the court found the plaintiffs had proved the defendants had impliedly acquiesced/consented to the plaintiffs' use of the access road. There was no evidence the defendants had objected to the plaintiffs' use of the access road since the time they became registered owners of PT 20213. It was only when DW3's demand for exorbitant toll charges was not met that access was denied (see paras 45 & 47).

[Bahasa Malaysia summary

Plaintif pertama ('P1') mengendalikan kilang bata dan ia memperolehi kebenaran plaintif kedua, yang memiliki sebidang tanah ('Lot 2074') yang mempunyai tanah berlempung, untuk menggali dan ekstrak tanah daripada Lot 2074 untuk pengeluaran bata di kilang. Semenjak 1960, jalan ke Lot 2074 adalah melalui jalan basikal/motosikal ('jalan akses') yang melalui, antara lain, tanah gersang yang mana bahagiannya adalah dimiliki oleh defendan-defendan sebagai PT 20213 pada bulan September 2006. P1 hanya mula menggunakan jalan akses tersebut melalui PT 20213 selepas Mei 2003 selepas ia mengupah kontraktor, DW3, untuk menebang pokok getah dan membersihkan tanah di Lot 2074 untuk memudahkan penggalian dan pengekstrakan daripadanya tanah berlempung. Untuk menebang pokok-pokok daripada Lot 2074, DW3 membesarkan jalan akses untuk membolehkan ia digunakan oleh kenderaan-kenderaan besar dan mesin yang lain. Pada tahun 2007, defendan-defendan yang tidak menggunakan langsung tanah PT 20213 untuk apa-apa, mengupah DW3 dan seorang yang lain sebagai ejen mereka untuk menjaga tanah PT 20213. DW3 mula menuntut daripada P1 untuk membayar tol bagi penggunaan jalan akses ke atas tanah defendan-defendan dan apabila P1 menolak daripada berbuat demikian DW3 secara lisan menuntut pada bulan Julai 2008 bahawa P1 berhenti daripada menggunakan jalan merentangi tanah PT 20213 dan menggali longkang yang dalam merentangi jalan tersebut untuk menafikan akses kenderaan. Plaintif-plaintif dalam tindakan ini menuntut bahawa defendan-defendan, melalui DW3, pada kesemua masa material menyedari, dan telah bersetuju kepada P1 mengguna jalan akses merentangi tanah mereka dan bahawa P1 telah memperolehi dengan sewajarnya isemen berekuiti ke atas tanah akses tersebut. Plaintif-plaintif, antara lain, memohon injunksi untuk menghalang defendan-defendan dan ejen-ejen mereka daripada campur tangan dengan

penggunaan tanah akses tersebut oleh mereka dan juga ganti rugi untuk kehilangan akses dan kerugian perniagaan yang ditanggung oleh P1.

Diputuskan:

(1) Sejak tahun 2003, DW3 mengetahui keperluan P1 untuk akses dan pada hakikatnya ia diupah untuk tugas itu, antara lain, memperolehi izin untuk hak jalan atas dasar jangka panjang daripada pemilik-pemilik lot yang relevan. Oleh itu, apabila DW3 diupah pada tahun 2007 oleh defendan-defendan, dia bukan sahaja tahu dengan susun atur kawasan tersebut tetapi juga mengetahui P1 telah menggunakan jalan akses tersebut semenjak tahun 2003. DW3 telah dengan sendirinya membesarkan jalan akses untuk membuatkannya mudah dilalui oleh lori-lori dan jentera lain dengan itu membolehkan penggalian tanah berlempung oleh P1 daripada Lot 2074 tersebut (lihat perenggan 34-35).

(2) Penggunaan jalan akses melalui tanah PT 20213 oleh orang awam telah dibuktikan semenjak tahun 1960an, sebelum tanah tersebut dipindahkan pada tahun 2006 (lihat perenggan 47).

(3) Memandangkan DW3 adalah ejen berkuasa defendan-defendan berkaitan PT 20213 dan DW3 mempunyai pengetahuan penuh mengenai kesemua fakta sebelum itu berkaitan jalan akses, mahkamah mendapati plaintif-plaintif telah membuktikan yang defendan-defendan telah secara tersirat bersetuju/memberi izin untuk penggunaan jalan akses kepada plaintif-plaintif. Tiada keterangan yang defendan-defendan membantah kepada penggunaan jalan akses oleh plaintif-plaintif semenjak mereka menjadi pemilik-pemilik berdaftar PT 20213. Ia hanya apabila tuntutan DW3 untuk caj tol yang tinggi tidak dipenuhi, jalan akses tersebut dinafikan (lihat perenggan 45 & 47).]

Notes

For a case on equitable easement, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3272.

Cases referred to

Cottage Home Sdn Bhd (No Syarikat 432596–V) v Wong Kau @ Wong Kon Lin & Thean Chan Fi [2011] MLJU 472, HC (refd)

Datin Siti Hajar v Murugasu [1970] 2 MLJ 153 (refd)

Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue Port Dickson & Ors [1987] 1 MLJ 147; [1986] CLJ (Rep) 673, HC (refd)

Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1993] 1 MLJ 443; [1992] 1 AMR 52, HC (refd)

Legislation referred to

National Land Code ss 203(3), 206(3), 282(1), (3), 284, 286

Sarengapani Rajoo (RS Pani & Associates) for the plaintiffs.
Tan Leng (YH Boo & Partners) for the defendants.

Hue Siew Kheng J:

THE PLAINTIFF'S CASE

[1] The first plaintiff ('P1') manages and operates a brick factory ('the factory'). The second plaintiff ('P2') is the registered owner of a piece of land held under Lot 2074 and had duly authorised P1 to excavate and transport clayey soil from Lot 2074 to the factory.

[2] P2 had earlier authorised one Highway Brick Works (which P1 had taken over from on 19 October 2004) since 2003 to excavate clayey soil from Lot 2074 for the production of bricks.

[3] Since 1960, the access to Lot 2074 and surrounding lots was by way of a track accessible by bicycle and motorcycles and the track ran along what is now the Keretapi Tanah Melayu Bhd ('KTM') reserve and through other neighbouring lands (Lots 428, 431, 430 and PT 20213). The users of this track were rubber tappers and other estate workers. There was no other access to Lot 2074.

[4] On 10 May 2003 Highway Brick Works had engaged a contractor, one Chua Yet Kong (Chua — DW3 — who is now the defendant's servant/agent) to fell the rubber trees and clear the land on Lot 2074 to facilitate the excavation and transportation of clayey soil to the brick factory from Lot 2074.

[5] Chua was allowed to remove the rubber trees and retain the profit from the sale of the felled trees. In order to remove the rubber trees from Lot 2074, Chua had widened the existing track to make it accessible to lorries and other machinery. Thereafter, Highway Brick Works commenced excavation on Lot 2074 to obtain clayey soil for their production of their bricks.

[6] Prior to 23 March 2006, PT 20213 did not exist as it had not been alienated: it was either state land or part of the KTM reserve. PT 20213 was only alienated on 23 March 2006 in equal shares to one Lee Siew Choong and Tan Kau who then transferred the land in equal shares to the defendants on 14 September 2006. On 14 September 2006 the defendants became the registered owners of PT 20213.

[7] At the material time the defendants had not used PT 20213 for any purpose and the said lot still remains a piece of barren land.

[8] The plaintiffs contend that the owners of Lots 461, 462, 463 did not object to the use of the access road and had given their implied consent and/or acquiesced to the use of the access road.

[9] Subsequently, the access road was destroyed, as in July 2008 the defendant's agent/representative (Chua and one Lim Yeong Shen) without any notice whatsoever verbally demanded that P1 ceased using the access road, across PT 20213. Various incidents happened during this period whereby Chua tried to prevent P1's lorries from travelling along the access road.

[10] The plaintiffs' case is that the defendants were at all material times fully aware of the plaintiffs' use of the access road to transport clayey soil from Lot 2074 to the brick factory and did not object to the same until July 2008 and as such the plaintiffs are entitled to an equitable easement over the existing access on PT 20213 which affords access from Lot 2074 to the KTM reserve.

[11] The plaintiffs sought, inter alia, the following reliefs:

(a) an easement of way under Part Seventeen of the National Land Code over the existing access road on PT 20213;

(b) alternatively, an equitable easement over the said access road;

(c) an injunction restraining the defendants and their successors in title, employees, agents, contractors and tenants, from interfering or prohibiting the plaintiffs from using the access road and from intimidating, harassing and assaulting the plaintiffs' directors, employees, agents and contractors while they use the access road;

(d) special damages for medical expenses arising from the assault of P1's employees in the sum of RM160; and

(e) general damages for loss of access to Lot 2074 and losses suffered by P1's business.

THE DEFENCE

[12] The defendants deny knowledge of the access road across PT 20213 and P1's use of the access road to transport clayey soil to the brick factory from Lot 2074.

[13] The defendants contend that they had never given their consent or

acquiesced to the use of the access road across PT 20213 by the plaintiffs and that such usage by the plaintiffs was without the consent and permission of the defendants or their agents.

[14] Further, it was contended that the defendants were using PT 20213 for agricultural activities and the plaintiffs' use of the access road across PT 20213 had adversely affected the agricultural activities on PT 20213 resulting in the land being unproductive and depreciating in value.

[15] The defendants deny that the plaintiffs are entitled to an equitable easement over the existing access road across PT 20213.

THE ISSUE

[16] The main issue for determination is whether the plaintiffs have right of access on PT 20213.

THE WITNESSES

[17] The plaintiffs called:

PW1 -	Shariful Akhtar bin Abu Kassim	- MD of P1 and P2
PW2 -	Mohamad Rohib bin Misnan	- Assistant land administrator
PW3 -	Mathevan a/l Sang Alimuthire	- Driver of P1
PW4 -	Shia Pak Sow @ Cheah Chee Nam	- Director of P1
PW5 -	Irwan Shah bin Baharom	- Process server
PW6 -	Abdul Pilus bin Bharudin	- Surveyor

[18] The defendants called:

DW1 -	Loo Ngan Keong	- The first defendant
DW2 -	Loo Hong Fui	- The second defendant
DW3 -	Chua Yet Kong	- The defendant's agent

THE PLAINTIFF'S SUBMISSION

[19] Learned counsel has submitted that based on the factual matrix of this case an equitable easement has been established. This submission is based on the following factors:

(a) PT 20213 was only alienated on 23 March 2006. Prior to this date, it was state land as confirmed by PW2 the assistant land administrator. PT 20213 was alienated to Lee Siew Choong and Tan Kau who subsequently

sold the land to the defendants which transfer of title took effect on 14 September 2006. At the material time, PT 20213 was barren land (*tanah tandus*) and was not a farm, nor had any agricultural activities been carried out on the land as alleged by the defendants;

(b) P1 (who was the successor of Highway Brick Works) which was in the business of manufacturing bricks needed good quality clayey soil found on Lot 2074 and was authorised to extract clayey soil from P2's land (Lot 2074);

(c) P1 in order to gain access to Lot 2074 from its brick factory needed to use the surrounding lots by way of a track accessible by bicycle and motorcycles and the track ran along KTM reserve land and on certain lands (Lots 428, 431, 430) and the land which after alienation was known at PT 20213; and

(d) the defendants knew of P1's use of the access road and had consented/acquiesced to such usage as Chua, their authorised agent was aware of this.

THE DEFENCE CONTENTION

[20] The defendants contend they were ignorant of any access road when they purchased PT 20213 and had never acquiesced to the plaintiffs' use of the said access road: neither did the plaintiffs prove there was ever any consent obtained from the defendants.

[21] It was also raised that P1 only used the access road for less than four years until they were denied access by the defendant's agent, DW3. This period of four years was far lesser compared to other cases wherein the court had considered, in granting an easement, for example of at least 20 years as in the case of *Cottage Home Sdn Bhd (No Syarikat 432596–V) v Wong Kau @ Wong Kon Lin & Thean Chan Fi* [2011] MLJU 472.

[22] Section 286 of the NLC was also referred to. In arguing that the plaintiffs are not entitled to an equitable easement over the said access road, the defendants contend that there are several alternative routes for the plaintiffs to travel to and from their brick factory and Lot 2074, citing *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue Port Dickson & Ors* [1987] 1 MLJ 147; [1986] CLJ (Rep) 673 in support.

[23] Furthermore, it is contended that it is not equitable to allow the plaintiffs an easement over the said access road which would effectively split the

land into two.

THE LAW

[24] Part Seventeen of the National Land Code (NLC) deals with 'easement'. Section 282(1) of the NLC defines 'easement' to mean:

> any right granted by one proprietor to another, in his capacity as such and for the beneficial enjoyment of his land …

Subsection (3) further provides:

> (3) The land for the benefit of which any easement is granted is in this Act referred to as 'the dominant land', and the land of the proprietor by whom it is granted as 'the servient land':

From the factual matrix of this case, it is clear that Lot 2074 is the dominant land whilst PT 20213 is the servient land.

[25] Learned counsel for the defendants rely on the principle laid down in *Datin Siti Hajar v Murugasu* [1970] 2 MLJ 153 wherein the High Court held that because of the express provisions in Part 17 of the NLC relating to easements, the English common law in relation to easements had ceased to apply in West Malaysia. The express provisions referred to, s 284 — prohibits the acquirement of any right in the nature of easement by way of prescription ie by any presumption of a grant from long and uninterrupted user, and also acquirement of such right by implied grant.

[26] However, as highlighted by the learned authors Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia*, s 206(3) of the NLC provides statutory authority for the liberal application of equity whenever there is a basis for that (at p 16).

[27] Reference was made to *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443; [1992] 1 AMR 52, wherein Edgar Joseph Jr J (as he then was) had, inter alia, held as follows — (at pp 489–490):

> In making the orders for the grant of an easement of way I had relied on the matters:
>
> (1) by cl 11 of the sale and purchase the defendant company had agreed that the lands concerned were sold to it subject to the right of way;
>
> (2) the defendant company knew perfectly well that the plaintiffs would not have sold but for the agreement to provide a right of way; and
>
> (3) it had been orally agreed by the defendant company to grant to the plaintiffs the right of way;

(4) The defendant company was stopped by its conduct and the conduct of its managing director from denying the plaintiffs a right of access from Lots 48 and 55 to the public highway known as the Batu Ferringhi Road.

It follows that all the four requirements for the creation of an easement of way are satisfied and these are:

(1) there must be dominant and servient land;

(2) the easement must accommodate the dominant land;

(3) the dominant and servient land-owners must be different persons; and

(4) the right granted must be capable of forming the subject matter of a grant.

I recognise that the effect of s 284 of the Code is that an easement can only be created by express grant followed by registration of an instrument in Form 17A or Form B prescribed by s 286(1), as the case may be. But, s 206(3) of the Code contains an express provision which states that the provisions of the Code requiring dealings to be effected in the statutorily prescribed manner shall,

> not affect the contractual operation of *any transaction* relating to alienated land or any interest therein. (Emphasis added.)

In *Yong Jong Wah v Siew Soon Wah* [1971] 2 MLJ 105, by resort to the doctrine of equitable estoppel and in the name of construction, although the agreement was not a proper instrument for registration as a lease yet the Federal Court treated it as an agreement for a lease and entitling the appellant to a lease for 35 years under s 221(3)(b) of the Code. As Ong CJ put it at p 108:

> The validity of contracts relating to alienated land or *any interest therein* is explicitly declared in s 203(3) of the National Land Code. (Emphasis added.)

This provides statutory authority for the liberal application of equity whenever there is a basis …

[28] An equitable easement can arise as a result of the operation of the principles of equity relating to proprietary estoppels. Proprietary estoppels 'or estoppels by acquiescence' is essentially a means by which proprietary rights may be affected or created. Because the principles are equitable and apply in cases of unconscionability; they are intended to remain flexible.

[29] It is trite that the court has a wide discretion as to the manner in which it will give effect to the equity, having regard to all the circumstances of the case and to the expectations and conduct of both parties: (see *Gale on Easements* (1st Ed), p 91). Therefore, in deciding as to the manner which this court will give effect to the equity, it is incumbent upon this court to consider all the circumstances of this case.

A

FINDINGS

Was there acquiescence/consent?

B

[30] DVV1 testified that when he purchased the property from the previous owners in September 2006 he had viewed the property before purchasing it and he did not see any access road on PT 20213. Neither did the previous owners inform him of any such access road.

C

[31] His evidence was that the first time he knew of the access road was on 21 July 2008 when PW4 called him up to inform him of a fight that had taken place because the defendant's agent had prevented them from using the access road. DW1 said he then left matters in the hands of his agent, DW3.

D

[32] The role played by DW3 — Chua in this case is significant: he had testified that he grew up and had lived in the vicinity since he was seven years old. He had been farming there for many years, ever since his father passed away and he took over the farm. Although at the material time he had been appointed as the defendant's agent in 2007 to look after PT 20213, he was also no stranger to the plaintiffs having been appointed by Highway Brick Works in 2003 to clear Lot 2074 and to fell and clear the rubber trees on the said lot. As consideration he was permitted to dispose of the rubber trees and retain the profits from the proceeds of sale. His letter of appointment dated 10 May 2003 was signed by PW1 when he was then the general manager of Highway Brick Works.

E

F

[33] Pursuant to the said letter, DW3 was also asked to:

G

> 2.1 Mendapatkan kebenaran hak laluan jangkamasa panjang melalui lot-lot terlibat sehingga ke laluan awam ataupun ke kilang Highway Brick Works (Serendah) Sdn Bhd.

H

[34] This goes to show that as far back as 2003, DW3 was aware of the plaintiff's need for and in fact, was expressly engaged for the task of, inter alia, obtaining consent for right of way on a long term basis from the relevant lot owners mentioned in the letter.

I

[35] Therefore, when he was subsequently engaged in January 2007 by the defendants he was not only familiar with the layout of that area but was also aware that P1 had been using the access road since 2003. PW1 had stated in his evidence in chief that DW3 had cleared the land and widened the existing track

(the access road) to make it accessible to lorries and other machineries so that excavation of clayey soil from Lot 2074 would be possible, (see Q&A 21 WSP1).

[36] PW1 had also testified that this access road was and is continuously used by others like rubber tappers and estate workers who require access to the surrounding areas. According to PW1 the access road begins at P1's brick factory, then continues beside the flyover on Lots 461 and 462 and along the KTM reserve. From then on, the access road cut across PT 20213, Lots 428 and 427 before accessing Lot 2074.

[37] Bearing in mind that in 2003 PT 20213 was still state land as it was only alienated in 2006, DW3's evidence that there was no access road across PT 20213 at that time should be viewed with caution. He was the one who cleared Lot 2074 for the plaintiffs for the excavation of the clayey soil. To do this, he needed an access road to remove the rubber trees felled by him from Lot 2074. PW1's evidence that it was DW3 who cleared and widened the existing track (ie the access road) was not rebutted by the defendants.

[38] I accept the plaintiffs' version that the access road was already there before 2003. This was in fact confirmed by PW2, the assistant land administrator that the investigation by his officer showed that the access road was used by members of the public like rubber tappers who needed access to the vicinity. Going by PW2's evidence, which corroborated PW1's evidence, the access road was not exclusively used by the plaintiffs as alleged by DW3.

[39] PW1 had testified as to the events leading to the reason for the filing of this suit. He had said (in Q&A 39 of WSP1):

(39)

Q What happened in 2008?

A The access road which was utilized by us was destroyed in July 2008 by the Defendants agent/representative (Chua Yet Kong (who is known Kong) and one Lim Yeong Shen) who without any notice demanded that Qiristar stop using the access road across PT 20213 and various incidents happened during this period where the said Kong had proceeded to dig two deep trenches across the access road, one to the south and other to the north of PT 20213. The trenches measure more than 30 feet long, 4 feet wide and 3 feet deep. This trenches effectively prevented the first plaintiff lorries from travelling along the access road and accessing to Lot 2074.

[40] Further on in his testimony he said as follows:

(41) Q: What do you want to say about the act and conduct done by the Defendant's and/or their representative?

A: At first, we did not know that such steps would be taken for reasons that we have been using the access road all this while and even my co-director Shia Pak Sow had spoken to the 1st Defendant and obtained his oral consent that there would not be such interference but however it seems otherwise. This interruption by the Defendant's representative had caused us great loss / damage as the Defendants did not give any notice whatsoever to the Plaintiffs to stop using the access road before digging the trenches. The conduct is wholly unconscionable and is done in bad faith.

(42) Q: Why do you say it is done in bad faith?

A: I say because the Defendant's servants, and/or representatives have dug the trench beyond the north boundary of PT 20213 and the north trench of Lot 431 and thereby preventing the 1st Plaintiff from using the access road. Further, the Defendant's representative (Chua Yet Kong) demanded that a toll of RM2.00 per lorry for each return trip to Lot 2074 be paid. Chua Yet Kong then later increased the toll to RMS.00 per lorry for 100 return trips a day is paid, this would amount to an exorbitant RM500.00 per day or RM15.000.00 a month as I believe the Defendants have not used PT 20213 for any other purpose as it is and remains as barren piece of land.

[41] This evidence of the demand for toll to be paid to DW3 was never rebutted by the defendants. After evaluating the plaintiff and defendant's version, I find the plaintiff's version to be more credible and I concur with the submission of learned counsel for the plaintiff that on the evidence adduced, DW3 as the authorised agent of the defendant had demanded toll charges for the usage of the access road. Upon refusal by the plaintiffs, he had dug deep trenches in July 2008 across the land effectively putting a stop to the plaintiff's lorries from accessing Lot 2074.

[42] Although the defendants had purchased the land since 2006 and in 2007 had engaged DW3 together with another partner to take care of the land, nothing was done on PT 20213 as clearly shown in the photographs produced. In any event, DW1 admitted that nothing was planted on the land.

[43] DW3 also did nothing to the land despite being a farmer all his life and being expressly engaged to 'menjaga kebun saya'. There was no *kebun* at all, just barren land.

[44] I did not find DW3 to be a credible witness: for instance, although he had said in his examination-in-chief that he knew the plaintiffs were excavating clayey soil from Lot 2074 since 2003, in cross, he changed his testimony and said that the plaintiffs were merely excavating clayey soil beside Lot 2074 and not at Lot 2074. This was despite the fact that he had been engaged by the

plaintiffs to clear Lot 2074 for the excavation of clayey soil from Lot 2074, not the neighbouring lots. I concur with the plaintiff that DW3 is not a reliable witness.

[45] Considering he is the defendant's authorised agent in respect of PT 20213, and DW3 having knowledge of the matters aforesaid, I find that the plaintiffs have proved, on the balance of probability, that there was acquiescence, in respect of usage of the access road as there is no evidence of any objection raised by the defendants since 14 September 2006 when they became the registered owners of Lot 2074.

[46] For a claim for easement to be sustained, the four basic characteristic as laid down are:

(a) there must be a dominant and servient land;

(b) the easement must accommodate the dominant land;

(c) the dominant and servient owners must be different persons; and

(d) the right granted must be capable of forming the subject matter of a grant (see *Templeton & Ors*).

[47] From the factual matrix as set out above I find the plaintiffs have proved all the necessary elements and established their claim for an equitable easement for the following reasons:

(a) the plaintiffs have proved on the balance of probability that the defendants have given their implied consent/acquiescence to the plaintiffs' use of the access road. It was not until DW3's demand for exorbitant toll charges was not met that access was denied by DW3 digging trenches across PT 20213, denying the plaintiffs' access to Lot 2074;

(b) the plaintiffs needed access to Lot 2074 for the purpose of extracting clayey soil for their brick factory. The access road was widened in 2003 by DW3 pursuant to an agreement with the previous owner of P1 and DW3 had also been expressly tasked with obtaining consent for right of access from all the neighbouring owners;

(c) DW3 being the authorised agent of the defendants had full knowledge of all the antecedent facts;

(d) it is not correct as contended by the defence that the usage was only for four years: it predated the alienation of the land. PW2 had testified that rubber tappers and estate workers had been using the access road for a

long time. It was only in 2003 that DW3 himself widened the access road for the benefit of the plaintiffs, whilst PT 20213 was still state land and unalienated; and

(e) PT 20213 was only alienated in 2006 whilst the usage of the access road had been established since 1960's.

The scale of justice clearly tilts in favour of the plaintiffs.

[48] It is not disputed that the present access road cuts across the defendants' land. I also take note that a formal application has been made to the land office for a 'Private Right of Ways' but has yet to be disposed of due to some miscommunication.

[49] In view of the foregoing I hereby grant the following:

(a) a declaratory order that the plaintiffs are entitled to an equitable easement over the existing road on PT 20213 affording access from Lot 2074 to the KTM reserve until such time when a suitable access is provided for by the *Pentadbiran Tanah Daerah*;

(b) the plaintiffs are to forward their amended plan in B72 to the land office within 14 days from today for the land office to take the further necessary action;

(c) general damages for loss of access to Lot 2074 and losses suffered by the first plaintiff's business to be assessed by the TP/SAR;

(d) aggravated damages allowed and to be assessed by the TP/SAR;

(e) interests at 5%pa from date of filing to realisation; and

(f) costs of RM25,000.

Order accordingly.

Reported by Ashok Kumar